

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS
EDUCATIONAL FOUNDATION,

Plaintiff,

V.

AMERICAN BOARD OF INTERNAL
MEDICINE, et al.,

Defendants.

Case No. 3:22-cv-240

JOINT DISCOVERY/CASE MANAGEMENT PLAN
under Rule 26(f) of the
Federal Rules of Civil Procedure

1. State where and when the conference among the parties required by Rule 26(f) of the Federal Rules of Civil Procedure was held, and identify the counsel who attended for each party, including name, address, bar number, phone and fax numbers, and email addresses. Note: The Rule 26(f) conference must be held in person or by phone, not simply over email.

Counsel for all the parties met on October 27 at 3pm by a telephone conference call. Counsel discussed all the relevant issues in depth at that time. Counsel who spoke during this Rule 26(f) telephone conference call included counsel for all the parties as identified below:

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2. List the cases related to this one that are pending in any state or federal court with the case number and court, and state how they are related.

None.

3. Briefly describe what this case is about.

This action is brought by a co-sponsor of medical conferences and publisher of educational materials on the internet, Plaintiff AAPS, against Defendants American Board of Internal Medicine (“ABIM”), American Board of Family Medicine (“ABFM”), American Board of Obstetrics and Gynecology (“ABOG”) (collectively, the “Board Defendants”), and Alejandro Mayorkas, in his official capacity as the Secretary of the U.S. Department of Homeland Security. Plaintiff contends that this action arises from Defendants’ alleged unprecedented campaigns to censor speech that they falsely disparage as “misinformation” or “disinformation.” Plaintiff further alleges that Defendants wrongly misuse their authority in a politically partisan manner to chill speech critical of positions taken by Dr. Anthony Fauci, lockdowns, mask mandates, Covid vaccines and even abortion. Plaintiff alleges Defendants have acted in an apparently coordinated manner, using similar timing and terminology, to censor those who exercise their First Amendment rights on issues of public concern.

Plaintiff has brought causes of action for violation by all Defendants of the First Amendment right of freedom of speech, violation by Defendant Mayorkas of the Administrative Procedure Act, tortious interference with business relations by the Board Defendants, the Board Defendants’ violation of Section 2 of the Sherman Act, and a declaratory judgment against all Defendants.

Defendants have filed three motions to dismiss. The Board Defendants have filed a motion to dismiss (ECF No. 23) on the grounds that Plaintiff lacks standing for its claims against them, and that even if it did have standing, its claims would fail as a matter of law because: (i) the Board Defendants are private actors and their alleged conduct is not state action subject to the First Amendment; (ii) Plaintiff does not allege conduct redressable by the Sherman Act and cannot adequately plead the elements of a Sherman Act claim; and (iii) Plaintiff does not plausibly plead the elements of a tortious interference claim. In addition, ABIM and ABFM have filed a motion to dismiss for lack of personal jurisdiction (ECF No. 21). And Defendant Mayorkas has filed a motion to dismiss (ECF No. 20) on the grounds that Plaintiff’s claims against him are moot, that Plaintiff lacks standing to bring the majority of its claims, and that Plaintiff fails to state a claim on the merits in any event.

4. Specify the allegation of federal jurisdiction.

Plaintiff contends that this action arises out of federal law: Defendants’ ongoing violations of the First Amendment of the U.S. Constitution, the Board Defendants’ violation of the Sherman Act, 15 U.S.C. § 2, and Defendant Mayorkas’s violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702, 706. Plaintiff contends that this action thereby raises federal questions over which this Court has jurisdiction pursuant

to 28 U.S.C. §§ 1331 and 1361. Plaintiff also asserts that this Court also has jurisdiction over the Sherman Act claim under 28 U.S.C. § 1337 and 15 U.S.C. §§ 15, 26, and supplemental jurisdiction over the claim for tortious interference exists under 28 U.S.C. § 1367.

5. Name the parties who disagree with the plaintiff's jurisdictional allegations and state their reasons.

All Defendants challenge standing, which is a jurisdictional objection, and Defendants ABIM and ABFM challenge personal jurisdiction. As noted in Section 3, the Board Defendants contend that this Court does not have subject matter jurisdiction because Plaintiff lacks standing for the claims it asserts. In addition, ABIM and ABFM contend that the Court does not have personal jurisdiction over them.

Defendant Mayorkas argues that all of Plaintiff's claims against Secretary Mayorkas are moot because the Disinformation Governance Board no longer exists, that Plaintiff lacks Article III standing to bring its First Amendment claim against Secretary Mayorkas due to the lack of traceability and redressability, and that Plaintiff lacks Article III standing to bring the majority of its FACA claims against Secretary Mayorkas due to the lack of an injury-in-fact.

6. List anticipated additional parties that should be included, when they can be added, and by whom they are wanted.

None.

7. List anticipated interventions.

None.

8. Describe class action issues.

None.

9. State whether each party represents that it has made the initial disclosures required by Rule 26(a)(1). If not, describe the arrangements that have been made to complete the disclosures.

Counsel for the parties discussed this during their Rule 26(f) conference, and agreed to complete and exchange their initial disclosures prior to the pretrial conference on November 9, 2022, with the exception of Defendant Mayorkas, who the parties agree, for purposes of this report, need not make initial disclosures due to Rule 26(a)(1)(B)(i).

10. Describe the proposed agreed discovery plan, including:

Counsel for the parties discussed this during their Rule 26(f) conference, and agreed that discovery should be deferred until resolution of the pending motions to dismiss because the motions could be dispositive of all of Plaintiff's claims, and even if they are granted in part would eliminate some claims and thereby reduce the scope of relevant discovery. Meanwhile, given the nature and scope of Plaintiff's claims, proceeding with discovery would be burdensome and expensive for all parties. Accordingly, all parties agree that a stay of discovery pending resolution of the motions to dismiss would be in the best interest of the parties and the Court. In the event the Court denies the motions to dismiss in whole or in part, the parties would promptly agree upon an expeditious schedule for fact and expert discovery, with the exception of Defendant Mayorkas, who maintains that the nature of Plaintiff's claims against him do not warrant discovery and, instead, would be appropriately reviewed on an administrative record, which Defendant Mayorkas would produce during summary judgment briefing if the Court denied Defendant Mayorkas's motion to dismiss in whole or in part. Should the Court wish for the parties to file a motion to this effect, they would be prepared to do so promptly.

11. If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party.

No known disagreement.

12. Specify the discovery beyond initial disclosures that has been undertaken to date.

None; see Section 10.

13. Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.

Full settlement among all the parties is unlikely at this stage. Defendants believe that their motions to dismiss should be granted, and therefore that settlement is unlikely with the motions pending. Nevertheless, the parties discussed the possibility of exploring potential grounds for settlement during the Rule 26(f) conference, and certain parties expressed willingness to explore further whether a partial settlement of some issues may be achievable.

14. Describe what each party has done or agreed to do to bring about a prompt resolution of this dispute.

The parties discussed the possibilities of settlement in the Rule 26(f) conference call as set forth in Section 13.

15. From the attorneys' discussion with their client(s), state the alternative dispute resolution techniques that are reasonably suitable.

None.

16. With the consent of all parties, United States Magistrate Judge Andrew Edison may preside and hear jury and nonjury trials. Indicate the parties' joint position on a trial before Magistrate Judge Edison.

The parties respectfully decline to consent to a trial before a magistrate.

17. State whether a jury demand has been made and if it was made on time.

No such demand has been made.

18. Specify the number of hours it will take to try this case (including jury selection, presentation of evidence, counsel's opening statements and argument, and charging the jury).

5 days or less.

19. List pending motions that could be ruled on at the initial pretrial conference.

None.

20. List other motions pending.

Defendants' motions to dismiss are pending, with briefing to be completed by December 16, 2022 in accordance with the schedule agreed upon by the parties and entered by the Court (ECF No. 11).

21. Indicate other matters peculiar to this case, including but not limited to traditional and electronic discovery issues, that deserve the special attention of the court at the Conference.

None.

22. Certify that all parties have filed Disclosure of Interested Parties as directed in the Order for Conference and Disclosure of Interested Parties, listing the date of filing for original and any amendments. DO NOT STATE THAT THE DISCLOSURE OF INTERESTED PARTIES WILL BE FILED IN THE FUTURE.

Plaintiff filed its Disclosure of Interested Parties on August 1, 2022 (ECF No. 6).

ABIM filed its Disclosure of Interested Parties on September 7, 2022 (ECF No. 12).
ABFM filed its Disclosure of Interested Parties on October 24, 2022 (ECF No. 26).
Defendant Mayorkas filed his Disclosure of Interested Parties on October 28, 2022 (ECF No. 27).

ABOG filed its Disclosure of Interested Parties on October 28, 2022 (ECF No. 28).

Dated: October 31, 2022

Respectfully submitted,

/s/ Andrew L. Schlafly

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CERTIFICATE OF SERVICE

I certify that on October 31, 2022, I filed a true and accurate copy of the foregoing document electronically via CM/ECF with the Court, which thereby served counsel of record for all the parties.

/s/ Andrew L. Schlafly
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